NO. 22563

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LEE DAVIDSON, A 70718A, and WALTER VERNON THOMAS, A 55727, Appellants, v. WARDEN J. H. KLINGER, California Men's Colony, and WARDEN A. L. OLIVER, Folsom Prison, Appellees.	)

APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE CENTRAL

DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain an application for writ of habeas corpus. 28 U.S.C.A. § 2241. A petition, prepared by counsel on this appeal, Joseph L. Armijo, Jr., and seeking appellants' release from state custody on habeas corpus, was filed by appellants in the District Court on June 13, 1967. (District Court Clerk's Transcript [hereafter referred to as D.C.C.T.], pages 3, 33.) This Court exercises jurisdiction over appeals from

final orders of the district courts in habeas corpus proceedings. 28 U.S.C.A. §§ 1291, 1294, 2253. The district court's order denying appellants' petition for writ of habeas corpus was filed September 21, 1967, and was a final order. (D.C.C.T. p. 65.) On October 10, 1967, the district judge who rendered the final order issued a certificate of probable cause under Title 28, United States Code Annotated, section 2253, allowing the present appeal to this Court. (D.C.C.T. p. 71.) On or about November 24, 1967, the district judge who rendered the final order granted appellants leave to appeal in forma pauperis. (D.C.C.T. pp. 75, 77.) On November 27, 1967, after leave of Court first obtained, notice of appeal was filed. (D.C.C.T. p. 78.)

STATEMENT OF THE CASE

Appellants, both state prisoners at the time of the proceedings below and at the present time, filed a petition for writ of habeas corpus in the district court alleging that their imprisonment was illegal in that they were convicted without representation by competent counsel. They based their claim of inadequate representation upon the failure of their counsel at the preliminary hearing and at trial to object to certain evidence which, for the first time in the district court, they characterized as the "fruit of the poisonous tree" or the product of an unlawful search and seizure. (D.C.C.T. pp. 6-9.)

Appellants sought to justify their choice of the

remedy of habeas corpus by alleging that the record of the state proceedings did not demonstrate the inadequacy of their legal representation at trial, and by asserting that therefore they must present facts outside the record. (D.C.C.T. p. 5.)

Appellants' custody arose out of their conviction in the Los Angeles Superior Court on one count of violation of California Penal Code section 245 (assault with a deadly weapon) and four counts of violation of California Penal Code section 211 (robbery). The degree of the latter offenses was fixed at robbery in the first degree. It was further determined in the state court proceedings that appellant Thomas was armed and appellant Davidson not armed at the time of the charged offenses, and that appellant Thomas had one prior felony conviction and appellant Davidson three prior felony convictions. On November 10, 1965, appellants were sentenced to state prison for the term prescribed by law, the sentence on each count to run concurrently with the sentences on the other counts. (District Court Exhibit II [Clerk's Transcript of the Superior Court proceedings], pages 74-75.)

Appellants filed notice of appeal from the state judgments of conviction. (Exh. II, pp. 76-79.) The appeal in that case is now pending in the California Court of Appeal, Second Appellate District, Division Two, as People v. Richard Lee Davidson and Walter Vernon Thomas, 2d Crim. 11971. Counsel herein, Joseph L. Armijo, Jr., was appointed to represent appellants on the state appeal. (Order of the Court of Appeal,

dated May 2, 1966, in 2d Crim. 11971.) The record in that appeal has been augmented to include the transcripts of two preliminary hearings (D.C. Exhs. III, IV) which took place on February 19, 1965 (resulting in dismissal of a narcotics violation charge against appellant Thomas), and April 9, 1965 (holding appellants to answer on the present charges on which they were ultimately convicted). (Orders of the Court of Appeal, dated June 20, 1966, and October 18, 1966.) By order of the California Court of Appeal, the time for filing Appellants' Opening Brief has been continued pending disposition of appellants' applications for writ of habeas corpus.

Appellants' applications in the California Court of Appeal and the California Supreme Court, on the identical grounds raised in the present proceedings, were denied by those courts without written opinion. (246 A.C.A. #1, Minutes for November 14, 1967, p. 7, 2d Crim. 12795; 66 A.C. #2, Minutes for March 15, 1967, p. 3, Crim. 10834.) (See also D.C.C.T. pp. 5-6.)

STATEMENT OF FACTS

(No testimony was taken in the District Court. The matter was determined on a consideration of the Petition for Writ of Habeas Corpus, the Response, and the transcripts of court proceedings received in the District Court as Exhibits I - IV. Reference to these transcripts is made in the argument herein.)

ARGUMENT

I

APPELLANTS HAVE FAILED TO EXHAUST STATE REMEDIES AVAILABLE TO THEM

A basic prerequisite to relief on habeas corpus in a federal court is that the petitioner have exhausted all available state remedies.

28 U.S.C.A. § 2254;

Fay v. Noia, 372 U.S. 391, 438 (1963).

Although appellants presented to the California Supreme Court and the California Court of Appeal the claims of error set forth in their petition below, their appeals from the judgments of conviction contested herein are still pending. (See D.C.C.T. pp. 5-6; App. Op. Br. pp. 2-3.)

Should the judgments of conviction be reversed on other grounds, the issues involved in the present proceedings might become moot. In any event the state court reviewing appellants' convictions should have the opportunity to pass upon appellants' contentions prior to a determination, on collateral attack, by the federal courts.

Therefore, it is submitted that appellants have not exhausted their available state remedies.

See Christiansen v. O'Connor, 378 F.2d 364, 365 (9th Cir. 1967), wherein this Court held that a state prisoner in a similar situation had "not exhausted his state remedies in view of the fact that his state appeal

from the criminal conviction is still pending."

See also Schiers v. People of State of California, 333 F.2d 173, 175-76 (9th Cir. 1964).

II

APPELLANTS' FAILURE, AT THE PRELIMINARY HEARING AND AT TRIAL, TO RAISE THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE FORECLOSES APPELLANTS' ATTEMPT TO RAISE THAT ISSUE IN THE FEDERAL COURTS UNDER THE GUISE OF A HABEAS CORPUS ATTACK UPON THE ADEQUACY OF APPELLANTS' LEGAL REPRESENTATION IN THE STATE TRIAL COURT PROCEEDINGS

Appellants base their contention of inadequate legal representation, at the preliminary hearing and trial in the state courts, upon the failure of their counsel to object to certain evidence on the ground that such evidence was the fruit of a purportedly unlawful search and seizure. (App. Op. Br. p. 26.)

The record of appellants' trial is silent as to appellants' arrest and as to any search incidental thereto. The witnesses who testified on behalf of the State of California were the five victims, as well as one police officer who arrived at the scene of the crime after appellants had left. Neither the testimony of these witnesses nor that of the defense witnesses sheds any light upon appellants' arrest or upon any search incidental thereto. (See D.C. Exh. 1.)

As previously noted, the record in the state appeal

has been augmented to include the transcripts of two preliminary hearings which were held, respectively, on February 19, 1965, and April 9, 1965. (D.C. Exhs. III, IV.)

The April 9, 1965, hearing clearly related to the offenses for which appellants were tried, which are the offenses which appellants attacked on petition for writ of habeas corpus in the District Court. However, at the April preliminary hearing, as at the trial, no evidence pertaining to the arrest and search of appellants was received.

The February 19, 1965, preliminary hearing related to a charge of possession of marijuana against appellant Thomas only. The sole witnesses at the hearing were two Los Angeles police officers assigned to the Narcotic Division who testified that they had arrested Thomas on February 4, 1965.[1/] (D.C. Exh. III, pp. 4, 22.) The officers had proceeded to Thomas' residence on information received from an unreliable informant, and their dual purpose was to conduct a narcotics investigation and to arrest Thomas on a traffic warrant. They searched Thomas' apartment and found a jar containing loose marijuana and several marijuana cigarettes. The officers also found some weapons on the premises. (D.C. Exh. III, pp. 19-20, 24-26, 28-29.)

It was held at the February 19, 1965, preliminary hearing that the narcotics were the product of an unlawful

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1/ The date of the assault and robberies, for which appellants were tried and convicted, was February 3, 1965. (D.C. Exh. I, p. 20.)

search. Appellant Thomas' motions to suppress the evidence and to dismiss the complaint were granted. (D.C. Exh. III, pp. 42-43.)

However, it is not clear from the transcripts of the two preliminary hearings and the trial transcript whether the narcotics arrest and search described above produced evidence leading to appellants' arrest and conviction on the assault and robbery charges. Appellants allege that several items, including jewelry and wallets containing identification, were discovered during the course of the February 4, 1965, search and that this discovery led the police to the assault and robbery victims, culminating in the filing of a second complaint charging petitioners with the present offenses. (D.C.C.T. pp. 7, 9; App. Op. Br. p. 7.)

There is nothing in the transcript of the February preliminary hearing to indicate that at the time of the arrest or at the time of the February hearing, appellants were suspected of having committed the assault and robberies. It should also be noted that the February incident does not appear to have involved appellant Davidson in any way.[2/]

It is elementary that matters outside the record may not be considered on appeal.

Palmer v. Hoffman, 318 U.S. 109, 116 (1943);

2/ Thus appellant Davidson apparently lacks standing to raise the issues set forth in the petition below and in Appellants' Opening Brief. Ker v. California, 374 U.S. 23, 34 (1963); Jones v. United States, 362 U.S. 257, 261-67 (1960).

People v. Reeves, 64 Cal. 2d 766, 776 (1966) [51 Cal. Rptr. 691, 697], cert. denied, 385 U.S. 952 (1966).

However, in habeas corpus proceedings the court may consider evidence outside the trial record if such evidence is directed to the proof of an issue which is not open to consideration on appeal and which is cognizable in the habeas corpus proceedings.

Waley v. Johnston, 316 U.S. 101, 104-05 (1942);

Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962);

In re McVickers, 29 Cal. 2d 264, 280 (1946) [176 P.2d 40, 47].

It is submitted that the issue of unlawful search and seizure is not an issue cognizable in the present habeas corpus proceeding.

See Eberhart v. United States, 262 F.2d 421 (9th Cir. 1958);

In re Lessard, 62 Cal. 2d 497 (1965) [42 Cal. Rptr. 583].

The Ninth Circuit held in Eberhart:

"Assuming for the moment, that the money or the narcotics used as evidence was obtained illegally, . . . this contention should have been urged at the trial and on appeal and cannot be used in a habeas corpus or § 2255 proceeding. [Citing cases.] The reception of illegally obtained evidence would be trial error which

should be challenged on appeal if known by the defendant during the trial."

Eberhart v. United States, supra at p. 422.

See also Clemas v. United States, 382 F.2d 403, 405(n.1) (8th Cir. 1967).

But cf. People of State of California v. Hurst, 325 F.2d 891, 894 (9th Cir. 1963), rev'd on other grounds, 381 U.S. 760 (1965).

In the Lessard case the California Supreme Court held:

"We do not believe that petitioner may at this date employ the writ of habeas corpus to attack the introduction of evidence which allegedly has been illegally obtained. Not only did petitioner's counsel fail to object at the trial to the receipt of the evidence but he . . . did not present the issue on appeal. A failure to object to the introduction of evidence which defendant alleges was illegally obtained precludes the successful presentation of the issue at the appellate level. [Citation.] Even if defendant did urge an objection at the trial level and the court allowed the evidence to be introduced, defendant cannot neglect his appeal and seize upon habeas corpus as an alternate remedy."

In re Lessard, supra, 62 Cal. 2d at p. 503 [42 Cal. Rptr. at p. 587].

Thus by reason of their failure to raise the issue of unlawful search and seizure at the state trial, appellants are precluded from raising this issue in the present habeas corpus proceedings.

As this Court recently stated under similar circumstances:

> "With this record before it, the District Court was entitled, in the exercise of sound discretion, to deny relief in the situation as to the claim upon the ground that there had been a deliberate bypassing of orderly state procedures under which the claim of search and seizure could have been raised. (Citing cases.)"
>
> Lessard v. Dickson, ____ F.2d ____ (9th Cir., No. 21513, decided April 17, 1968) [slip opinion pp. 7-8].

The case of Henry v. Mississippi, 379 U.S. 443 (1965), upon which appellants rely (App. Op. Br. p. 29), does not help them since (1) the United States Supreme Court, in remanding the case to the lower courts for a finding on the issue of waiver, considered it significant that the defendants were represented by out-of-state counsel who apparently were unfamiliar with Mississippi procedure; (2) defense counsel at trial raised the issue of unlawful search and seizure by

moving for a directed verdict at the close of the state's case, assigning as one ground the use of illegal evidence.

See also Nelson v. People of State of California, 346 F.2d 73, 77-82 (9th Cir. 1965);

Gendron v. United States, 340 F.2d 601 (8th Cir. 1965).

Appellants allege that their failure to raise the issue of unlawful search and seizure should be excused by reason of the purportedly inadequate legal representation which they received at trial and at the April preliminary hearing.

Apparently the claim of lack of effective counsel may be made in habeas corpus proceedings despite failure to raise this issue at trial or on appeal.

See Brubaker v. Dickson, supra, 310 F.2d 30, 38-39 (9th Cir. 1962);

In re Rose, 62 Cal. 2d 384, 386 (1965) [42 Cal. Rptr. 236, 238].

The basic question here presented is whether a defendant, by the device of framing an alleged violation of his constitutional rights in terms of his counsel's having lacked the competence to raise that purported violation at trial, may circumvent the basic rule that on appeal matters outside the record may not be considered and that habeas corpus will not lie to review matters which could have been but were not raised at trial and on appeal.

Cf. Bates v. Wilson, 385 F.2d 771, 773

(9th Cir. 1967).

Appellees submit that habeas corpus should not lie to review a claim of denial of effective counsel which claim is clearly lacking in merit and is no more than a guise designed to permit appellants to circumvent the orderly process of state appeals. To permit petitioners to proceed in habeas corpus and litigate for the first time in these proceedings the issue of unlawful search and seizure would encourage defendants in the state courts to withhold the raising of such an issue until after they had attempted, and failed, to obtain a favorable result at trial.

See In re Carmen, 48 Cal. 2d 851, 855 (1957) [313 P.2d 817, 819], cert. denied, 355 U.S. 924 (1958).

III

THE SEARCH OF APPELLANT THOMAS' HOUSE WAS LEGAL

Appellants contend that the February 4, 1965, search of appellant Thomas' house was unlawful and that their trial counsel was incompetent by reason of his failure to object to the purported fruits of this search. (App. Op. Br. pp. 15, 26.)

At the February 19, 1965, preliminary hearing, the narcotics violation charge against appellant Thomas was dismissed for lack of evidence after the court ruled that the narcotics offered in evidence were the product of an unlawful search and seizure. (D.C. Exh. III, pp. 42-43.)

However, this determination was not res judicata as to the validity of the search, and this Court may determine under the same facts that the search was lawful.

People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 95 (1964) [41 Cal. Rptr. 290, 292];

People v. Van Eyk, 56 Cal. 2d 471, 477 (1961) [15 Cal. Rptr. 150, 155], cert. denied, 369 U.S. 824 (1962);

People v. Prewitt, 52 Cal. 2d 330, 339-40 (1959) [341 P.2d 1, 6].

See also Hurst v. People of State of California, 211 F.Supp. 387, 391 (N.D. Cal. N.D. 1962), aff'd 325 F.2d 891 (9th Cir. 1963), rev'd on other grounds, 381 U.S. 760 (1965).

Officers Ronald Garrahan and John Olson of the Los Angeles Police Department arrested appellant Thomas on February 4, 1965. (D.C. Exh. III, pp. 4, 22.) The purpose of both officers, in proceeding to Thomas' residence on that date, was twofold: (1) to effect an arrest on an outstanding traffic warrant (D.C. Exh. III, pp. 12, 30); (2) to conduct a narcotics investigation. (D.C. Exh. III, pp. 19-20, 33.)

In addition to their knowledge of the outstanding traffic warrant, the officers had received information from a known but unreliable informant that Walter Vernon Thomas had a 1955 black and white Oldsmobile bearing the license number PCY 542, that Thomas "was living at 1048-1/5 [South] Ardmore; that Mr. Thomas was presently on parole, and that

Mr. Thomas had a sawed off shotgun and several handguns in his possession, along with marijuana and pills or tablets." (D.C. Exh. III, pp, 9, 29-30.)

On January 21, 1965, a fellow officer, a Sergeant Barr, had informed the two officers that:

> ". . . Thomas was dealing in narcotics; that he was working for a big narcotic pusher that they called The Big Man that lived in Monterey Park; that the defendant Thomas often made trips to the airport for The Big Man, and on one occasion this trip involved three kilos of marijuana.
>
> "Sergeant Barr further . . . [related] that the defendant Thomas often made trips to San Francisco for The Big Man, and that he came back with wads of money.
>
> "Sergeant Barr further . . . [related] that The Big Man had a cousin by the name of Chuck that lived in the same apartment house with him and that is where Thomas went to get his narcotics, was from Chuck.
>
> "He further . . . [related] that Thomas was engaged in burglaries and robberies in the Los Angeles area, and that he had a .38 revolver.
>
> "He further stated that he had what he thought was a 1956 black and white Oldsmobile

convertible."

(D.C. Exh. III, pp. 4-5.)

The officers checked the police records, obtained a picture of Thomas, and verified that Thomas had a prior narcotics violation and that Thomas was presently on parole for robbery. (D.C. Exh. III, pp. 4, 8.) Officer Olson made an unsuccessful attempt to locate Thomas' parole officer. (D.C. Exh. III, pp. 31-32.)

Shortly after receiving the telephone call from the informer, Garrahan and Olson in the company of two other officers proceeded to Thomas' residence at 1048-1/5 South Ardmore. (D.C. Exh. III, p. 9.)

Upon their arrival at the location of Thomas' residence, the officers noticed a 1955 black and white Oldsmobile bearing the license number PCY 542. This was the same vehicle and license number specified in the traffic warrant. Garrahan and another officer went to the front door and knocked. (D.C. Exh. III, pp. 8-9, 23.)

Garrahan showed Thomas his badge and stated, "'I'm a police officer.'" At that moment Garrahan observed a person run into another room. Garrahan ran into the kitchen after the person, who was then brought back into the front room although not placed under arrest. (D.C. Exh. III, pp. 9-10, 16.)

Officer Garrahan's purpose in running after the person was to "protect myself and my partner in view of the information regarding the guns and the sawed off shotgun that

was supposed to be in the apartment." (D.C. Exh. III, p. 19.)

While in the kitchen Garrahan heard someone at the back door. He then told Olson and another officer to "come around to the front," and the latter two officers then entered the house. (D.C. Exh. III, p. 10.)

The officers, Thomas, and the three other occupants of the house all went into the living room. None of the occupants of the house was handcuffed, nor did any of the officers draw his gun. (D.C. Exh. III, pp. 17-18, 24.)

Officer Olson proceeded into the bedroom, because he "was concerned as to whether there were any more people within this house. . . . [H]e also was concerned about any guns that could be in the premises." (D.C. Exh. III, p. 33.)

For these reasons he "quickly looked into a closet, . . . looked under the bed immediately to see if there were any other persons in that room, and then . . . conducted a search of the bedroom." When Olson looked under a bed he noticed a box protruding from underneath a dresser and pulled it out. Inside the box he saw a glass jar containing green leafy material and a small loose quantity of the material. Upon examining the material more closely, he formed the opinion that it was marijuana.[3/] (D.C. Exh. III, pp. 24, 33-34.)

3/ It was stipulated at the preliminary hearing that Olson had sufficient training to recognize marijuana, and that the substance was marijuana. (D.C. Exh. III, p. 25.)

Officer Olson returned to the living room and advised all the occupants of the house that they were under arrest for possession of marijuana. Olson then advised the suspects of their constitutional rights. (D.C. Exh. III, pp. 24-25.)

Olson continued his search of the bedroom. He found several handguns and a sawed-off shotgun. He also found two partially burned cigarettes, which appeared to contain marijuana, inside a nightstand, and recovered a similar cigarette and a number of tablets from the top drawer in the dresser.[4/] (D.C. Exh. III, p. 26.)

Insofar as the February 4, 1965, arrest of appellant Thomas and the search of his house complied with the general requirements of probable cause in the Fourth and Fourteenth Amendments to the federal Constitution, "the lawfulness of . . . [this arrest] by state officers for state offenses is to be determined by California law," since the State is free to develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' . . . ."

Ker v. California, supra, 374 U.S. 23, 34, 37-38 (1963).

Under California law a police officer may make an arrest "[w]henever he has reasonable cause to believe that the person to be arrested has committed . . . . a felony . . . ."

4/ It was also stipulated that the cigarettes contained marijuana. (D.C. Exh. III, pp. 27-28.)

Pen. Code § 836. The police need not procure an arrest warrant or search warrant merely because it might have been practicable to do so.

United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950);

Pen. Code § 836;

People v. Winston, 46 Cal. 2d 151, 162-63 (1956) [293 P.2d 40, 46-47].

Probable or reasonable cause "has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."

People v. Ingle, 53 Cal. 2d 407, 412 (1960) [2 Cal. Rptr. 14, 17], cert. denied, 364 U.S. 841 (1960).

It cannot be doubted that the officers had the right to investigate the information which they had received from the known but unreliable informant. The would have been remiss in their duty had they not followed up this lead, notwithstanding the fact that the information then in their possession would not have been sufficient in itself to justify the arrest of Thomas or a search of his premises. Furthermore, the officers had the right and the duty to arrest Thomas on the outstanding traffic warrant.

"[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." People v. Michael, 45 Cal. 2d

751, 754 (1955) [290 P.2d 852, 854]. The observations of the officers during the course of such a permissible visit may give them additional information which, combined with their previously held information, will afford them probable cause for an arrest.

People v. Martin, 45 Cal. 2d 755, 761 (1955) [290 P.2d 855, 858].

When Thomas opened the door and Garrahan identified himself as a police officer, the officers observed a figure flee into another room. This furtive conduct, in the context of the officers' prior information that Thomas was a convicted robber and narcotics violator and that there were handguns and a sawed-off shotgun inside the house, justified the officers in quickly entering the house, locating the occupants, and searching the premises for weapons in order to protect themselves.

People v. Smith, 63 Cal. 2d 779, 797 (1966) [48 Cal. Rptr. 382, 394], cert. denied, 388 U.S. 913 (1967);

People v. Blodgett, 46 Cal. 2d 114, 117 (1956) [293 P.2d 57, 58];

People v. Witt, 159 Cal. App. 2d 492, 494-97 (1958) [324 P.2d 79, 81].

See also Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), and cases cited therein.

During the search for weapons (weapons ultimately were discovered), the police "were not compelled to close

their eyes to the contents of the house, and their ensuing search was incidental to the purpose of their entry . . . . The evidence obtained by that search was properly admitted."

People v. Smith, supra, 63 Cal. 2d at p. 798 [48 Cal. Rptr. at p. 395].

See also People v. Wright, 153 Cal. App. 2d 35, 37-40 (1957) [313 P.2d 868, 870-71];

People v. Jiminez, 143 Cal. App. 2d 671, 672-75 (1956) [300 P.2d 68, 70-71].

Having found the marijuana the officers clearly had probable cause to arrest the occupants of the house. The officers had the right to make a further search of the premises incident to these valid arrests. In re Dixon, 41 Cal. 2d 756, 761-62 (1953) [264 P.2d 513, 516]. This search could precede or follow the formal arrests.

People v. Ingle, supra, 53 Cal. 2d 407, 413 (1960) [2 Cal. Rptr. 14, 17].

Appellees submit that the February 4, 1965, arrest of appellant Thomas, and the search of his house, were lawful.

IV

REGARDLESS OF WHETHER THE SEARCH WAS LAWFUL, THE FAILURE OF APPELLANTS' TRIAL COUNSEL TO RAISE THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE DID NOT DEPRIVE APPELLANTS OF THE RIGHT TO REPRESENTATION BY COMPETENT COUNSEL, PARTICULARLY SINCE THE TESTIMONY OF EYEWITNESSES IS NOT WITHIN THE DOCTRINE BARRING FROM EVIDENCE THE FRUIT OF AN UNLAWFUL SEARCH

Appellants claim (App. Op. Br. p. 29) that they were denied the constitutional right to representation by competent counsel at the preliminary hearing and trial upon the assault

and robbery charges by reason of the failure of their counsel to explore whether or not certain wallets, which contained identification and which were taken from the robbery victims by appellants and returned to the victims by the police (D.C. Exh. I, pp. 103-04, 149, 185-86), were seized by the officers during the course of the arrest of appellant Thomas and the search of his house on February 4, 1965, the day following the robberies. (D.C. Exh. I, p. 20.) Appellants claim that if these wallets and identification were obtained by the police in this manner, it must be assumed that this evidence was the sole factor that led the police to the eyewitness victims who testified against appellants on the robbery charges, and that therefore this testimony came within the doctrine barring from evidence the fruit of an unlawful search and seizure. (App. Op. Br. p. 16.)

Appellants rely principally upon the cases of Brubaker v. Dickson, supra, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), and People v. Ibarra, 60 Cal. 2d 460 (1963) [34 Cal. Rptr. 863], in support of their claim of inadequate counsel.

The Brubaker opinion states:

> "The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated: 'The requirement of the Fourteenth Amendment is for a fair trial'; . . . the due process clause 'prohibits the conviction and incar-

the common and fundamental ideas of fairness and right.' . . .

". . . . Appellant was entitled to 'effective aid in the preparation and trial of the case.' . . .

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right . . . . Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' . . . Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; . . . it is inevitably a question of judgment and degree." (Emphasis by the Court.)

Brubaker v. Dickson, supra at p. 37.

The Ibarra case sets forth the rule that in order to justify relief on the ground of incompetent counsel,

". . . . 'an extreme case must be disclosed.' [Citations.] It must appear that counsel's lack of diligence or competence reduced the

trial to a 'farce or a sham.' [Citations.]"

People v. Ibarra, supra, 60 Cal. 2d at p. 464 [34 Cal. Rptr. at p. 866].

In the Ibarra case the California Supreme Court found that the defendant's trial counsel had been unaware of a "commonplace" "rule of law basic to the case; a rule that reasonable preparation would have revealed."

People v. Ibarra, supra, 60 Cal. 2d at pp. 465-66 [34 Cal. Rptr. at pp. 866-67].

Appellees submit that an examination of the record in the proceedings below demonstrates that appellants received an able and effective defense and that appellants' contention to the contrary is merely a vehicle by which appellants seek to raise new (and meritless) issues outside the record.

Furthermore, defense counsel at the state proceedings indicated that they were not ignorant of the possible applicability of the "fruit of the poisonous tree" doctrine when they moved for exclusion of evidence of the police officers' having returned certain wallets and watches to the victims.[5/] (D.C. Exh. I, pp. 201-10.) It cannot be said that the exercise of normal diligence would have required

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5/ The trial court reserved its ruling on the motion. It appears from the record that the trial court was not subsequently pressed for a ruling and that none was ever made. The failure of appellants' counsel to procure a ruling on the motion was the equivalent of a failure to so move. People v. Brown, 238 Cal. App. 2d 924, 929 (1965) [48 Cal. Rptr. 204, 206-07]; People v. Valdez, 188 Cal. App. 2d 750, 758 (1961) [10 Cal. Rptr. 664, 667-68].

counsel in the trial proceedings to advance the somewhat attenuated contentions made by appellants in the present proceedings.

See Bates v. Wilson, supra, 385 F.2d 771, 773 (9th Cir. 1967);

Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963).

The following authority seems to demonstrate that it is appellants, rather than their trial counsel, who are unaware of a basic rule of law. That rule is the inapplicability to eyewitness testimony, under the present circumstances, of the doctrine barring from evidence the fruit of an unlawful search and seizure.

Even if the truth of appellants' allegation is assumed, arguendo, regarding the police's having located the assault and robbery victims by means of wallets and identification purportedly found in appellant Thomas' apartment during the course of an unlawful search, appellants have failed to make an adequate showing that the search actually provided the evidence leading to their conviction.

The United States Supreme Court has held:

> ". . . . [T]he exclusionary rule has no application . . . [where] the Government learned of the evidence 'from an independent source,' Silverthrone Lumber Co. v. United States, 251 U.S. 384, 392; nor . . . [where] the connection between the lawless conduct of the police and the discovery

of the challenged evidence has 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341. We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959) . . . ." (Emphasis added.)

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

See also Hoffa v. United States, 385 U.S. 293, 308-09 (1966);

Nardone v. United States, 308 U.S. 338, 341 (1939).

The District Court characterized "the basic question here presented" as follows:

"Can the voluntary testimony of a witness in a criminal case be excluded merely because the identity of the witness was learned from information obtained through an illegal search and seizure?"

(D.C.C.T. p. 66.)

The District Court answered this question in the negative and relied greatly on the Wong Sun opinion in arriving at its conclusion that since "the victims testified voluntarily and without compulsion or influence being imposed upon them by illegally seized evidence, certainly the arrest and their testimony had become so attenuated as to dissipate any taint." (D.C.C.T. p. 68.)

Similarly in People v. Ditson, 57 Cal. 2d 415 (1962) [20 Cal. Rptr. 165], the defendants contended that certain testimony was the product or "fruit" of an inadmissible confession. The California Supreme Court, in affirming the convictions, set forth the following standard for determining whether evidence was the product of unlawfully obtained evidence:

> The trier of fact ". . . . must exercise great care to determine . . . [whether] the asserted 'fruits' of the confession . . . were in fact a product of that confession and would not have been otherwise discovered by the police from information already in their possession or independently acquired."
>
> (Emphasis by the Court.)
>
> People v. Ditson, supra, 57 Cal. 2d at pp. 443-44 [20 Cal. Rptr. at p. 181].

The Court in Ditson found that the act of one of the defendants during an invalid confession, in naming two

individuals, one of whom later testified and led the police to the discovery of other future witnesses,

> ". . . was no evidence but merely a 'lead' in the process of investigation which had begun before defendants' arrest and had furnished the prosecution with all the evidence necessary to convict defendant . . . ."
>
> People v. Ditson, supra, 57 Cal. 2d at p. 444 [20 Cal. Rptr. at p. 181].
>
> See also People v. Garay, 247 Cal. App. 2d 833, 837-38 (1967) [56 Cal. Rptr. 55, 57-58].

The most recent decisions of the United States Supreme Court have reiterated the rule that prior illegal conduct by the police relating to identification of the defendant will not per se require the exclusion of subsequent evidence of identification.

> United States v. Wade, 388 U.S. 218, 239-43 (1967);
>
> Gilbert v. California, 388 U.S. 263, 272 (1967).

In the present proceeding, unlike the Wade and Gilbert cases, the record does "permit an informed judgment whether the in-court identifications at the . . . trial had an independent source."

> Gilbert v. California, supra at p. 272.

The practice condemned in those cases, the conducting of a police lineup without notice to the attorney of an indicted suspect, could easily taint the subsequent courtroom

identification by the victim.

In the absence of counsel at the lineup, the police could without detection by the suspect employ

> ". . . instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance from the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect." (Footnotes omitted.)

United States v. Wade, supra, 388 U.S. 218, 233.

> "[T]here is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial . . . ."

Supra at p. 236.

> ". . . . The lineup is most often used . . . to crystallize the witnesses' identification

of the defendant for future reference. . . ."

Supra at p. 240.

In contrast, any illegality in the conduct of the police in obtaining the names of the robbery victims who testified at appellants' trial could not in any way have affected the substance or truthfulness of the victims' testimony at the trial identifying appellants as the perpetrators of the offenses charged. The names which the police might have obtained by reason of their search of appellant Thomas' house were "not evidence but merely a 'lead' in a process of investigation."

People v. Ditson, supra, 57 Cal. 2d 415, 444 (1962) [20 Cal. Rptr. 165, 181].

Analogous to the present situation are those cases involving identification by a witness during a period of unlawful detention (not involving a police lineup).

In Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961), cert. denied, 368 U.S. 883 (1961), the Court of Appeals rejected the defendant's contention that the witness' courtroom identification of the defendant was inadmissible by reason of a prior identification, not alluded to at the trial, which had taken place during a period of unlawful detention. The court held:

". . . . The consequences of accepting appellant's contention in the present situation would be that . . . [the witness] would be forever precluded from testifying against

Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. . . ."

Payne v. United States, supra at p. 727.

The Payne decision cites with approval the opinion in Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960), cert. denied, 379 U.S. 908 (1964), wherein the court affirmed a conviction after a trial in which "the prosecutor introduced a fingerprint other than that taken during the period of illegal detention, but which he was able to obtain because he knew . . . [the defendant's] identity as a result of the fingerprints taken during that period."

Payne v. United States, supra at p. 726.

Similarly in Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964), where a witness was found as a result of information obtained while the defendants were illegally in custody, it was held:

"Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eye-witness to a crime because of the circumstances

in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and . . . [the witness'] testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. No case has been cited to us in which the testimony of an eyewitness or factual witness has been excluded because his identity was discovered as a result of disclosures made by an accused during detention violative of Rule 5(a) Fed.R. Crim. P. . . . .

". . . .

"Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with his confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and

volition interact to determine what testimony he will give. . . . The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. . . ."

Smith v. United States, supra at pp. 881-82.

See also People v. Van Eyk, supra, 56 Cal. 2d 471, 480 (1961) [15 Cal. Rptr. 150, 155], cert. denied, 369 U.S. 824 (1962).

Appellees submit that to extend the doctrine, which bars from evidence the product of an unlawful search, to the remote purported consequences of the search in the present case would not be in keeping with the rationale of the doctrine. Certainly the police in conducting the search were acting in good faith and could not have hoped to uncover evidence of the assault and robberies of which they were apparently unaware. To bar from evidence the testimony of the victims because there was a possibility that the wallets were found during the search of appellant Thomas' house and unexpectedly connected appellants to the present offenses would not serve to deter improper conduct on the part of the police. Such an extension of the rule would only needlessly penalize the police and would in effect contravene the well established rule that an unlawful arrest does not render a defendant immune from prosecution.

Frisbie v. Collins, 342 U.S. 519, 522-23 (1952);

People v. Valenti, 49 Cal. 2d 199, 203[6/] (1957) [316 P.2d 633, 635].

In support of appellees' position that the testimony of the eyewitness victims is not within the "fruit of the poisonous tree" doctrine is the affirmative evidence in the record that at least one of the victims had described "some of the suspects" to the police. (D.C. Exh. I, pp. 194-95.) This occurred when police officers arrived at the scene shortly after the assault and robberies had taken place. (D.C. Exh. I, pp. 21, 190-91.) It must be assumed that this description fit the suspects.

People v. Sandoval, 65 Cal. 2d 303, 308-09 (1966) [54 Cal. Rptr. 123, 125], cert. denied, 386 U.S. 948 (1967);

People v. Cantley, 163 Cal. App. 2d 762, 767 (1958) [329 P.2d 993, 996].

It seems permissible to infer that the victims informed the police that they had been robbed and that the victims gave the police some sort of description of the robbers. Thus presumably the police were conducting an investigation of the assault and robberies on February 3, 1965. It should not be assumed that absent the purported discovery of the victims' wallets and identification during the course of a purportedly unlawful search on February 4,

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6/ Disapproved on other grounds in People v. Sidener, 58 Cal. 2d 645, 647 (1962) [25 Cal. Rptr. 697, 698], appeal dismissed, 374 U.S. 494 (1963).

1965, the police would never have been able to connect appellants with the assault and robberies concerning which five eyewitness victims were able to testify at trial. Furthermore, the asserted violation of appellants' constitutional rights had no bearing on the question of appellants' guilt.

Cf. In re Davis, 242 Cal. App. 2d 645, 649 (1966) [51 Cal. Rptr. 702, 704].

Finally, it should be noted that evidence in the record concerning the action of the police in returning the wallets (containing identification) to the victims at the time of the April preliminary hearing is only mildly suggestive of the police's having obtained these items by means of a search of appellants' premises, let alone by means of the particular search which took place on February 4, 1965. (D.C. Exh. I, pp. 149, 185-86.) The evidence appears to be equally consistent with the possibility that the wallets were found discarded in a trash can and subsequently came into the hands of the police, as is often the case in a robbery investigation.

Even if a defendant "has no opportunity to develop facts that may show that essential evidence was illegally obtained, if the record is silent on this question, it must be presumed that the officers acted lawfully."

People v. Prewitt, supra, 52 Cal. 2d 330, 335 (1959) [341 P.2d 1, 3].

Appellees submit that under the facts alleged by appellants, and in light of the record in the pending state appeal, a sufficient showing has not been made that the

testimony of the eyewitness victims was the product of an unlawful search and seizure. Thus appellants' claim that they were denied the aid of effective counsel by reason of counsel's failure to object on this tenuous and unapparent ground must fail. Certainly appellants have not made the requisite showing that their trial was reduced to a farce or a sham by the legal representation they received.

See Bates v. Wilson, supra, 385 F.2d 771, 773 (9th Cir. 1967).

The record does not support appellants' assertion (App. Op. Br. pp. 9, 28) that appellants or their counsel at the trial had knowledge of the purported fact that during the search of appellant Thomas' house the police seized wallets containing identification which ultimately led the police to the victims of the robbery. (D.C. Exh. I, pp. 186-93, 201-10.)

Furthermore, this assertion suggests that such knowledge by trial counsel would negate appellants' argument that they were denied the right to competent counsel, since the denial of this right hinges upon counsel's ignorance of a rule of law basic to the case.

Brubaker v. Dickson, supra, 310 F.2d 30, 38-39 (9th Cir. 1962);

People v. Ibarra, supra, 60 Cal. 2d 460, 465-66 (1963) [34 Cal. Rptr. 863, 866-67].

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CONCLUSION

For the foregoing reasons it is requested that the order of the District Court denying appellants' Petition for Writ of Habeas Corpus be affirmed.

Respectfully submitted,

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CR LA 67-763

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald M. George

RONALD M. GEORGE
Deputy Attorney General

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

_____, being first duly sworn, deposes and says:

That he is a citizen of the United States, a resident of Los Angeles County, over 18 years of age, not a party to the within cause, and employed as a clerk in the Los Angeles Office of the Attorney General of the State of California, who is one of the attorneys for appellees in the above entitled matter; that the person listed below is attorney for appellants in the within cause:

JOSE L. ARMIJO, JR., Esq.
Attorney at Law
265 East Carson Street
Torrance, California 90502

that there is delivery service by United States mail at the place so addressed, and there is a regular communication by mail between the place of mailing and the place so addressed; that affiant enclosed three (3) copies of Appellees' Brief in an envelope addressed to said person set forth above; that affiant sealed said envelope and deposited same in a United States Post Office mailbox located at the State Building, Los Angeles, California, on the ____ day of May, 1968, with postage thereon fully prepaid.

_____

Subscribed and sworn to before me
This ____ day of May, 1968.

/s/ Helen Anderson
_____